

ICWA Hot Topics

Cow County Institute

June 8, 2015

Hon. Sunshine Sykes

Hon. Joanne Willis Newton

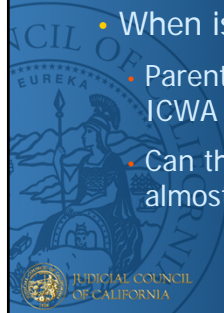
ICWA hot topics

- In re Abbigail A.
- In re Isaiah W.
- In re. Alexandria P.
- C.F. v. Superior Court of Mendo
- Oglala Sioux Tribe v. Van Hunnik
- New BIA Guidelines
- Proposed BIA regulations

In re. Abbigail A.

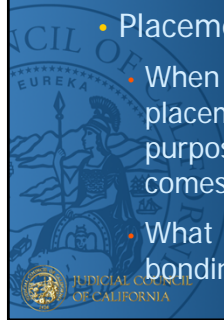
- Who is an Indian child?
- ICWA definition – eligible & biological child of a member.
- Membership vs. enrollment.
- What best advances interests of ICWA & CalICWA?

In re Isaiah W.



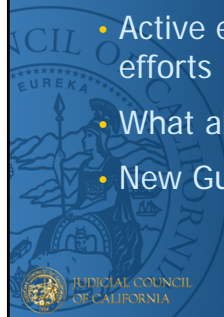
- When is ICWA issue forfeited?
- Parent didn't appeal finding that ICWA didn't apply;
- Can the parent raise it after TPR almost a year later?

Alexandria P.



- Placement preferences
- When tribe agrees with placement for foster care purposes can they object when it comes to permanency?
- What is the significance of bonding and attachment?

C.F. v. Superior Court



- Active efforts = reasonable efforts
- What about WIC 361.7?
- New Guidelines & Regulations

Oglala Sioux Tribe v. Van Hunnik

- South Dakota class action case in federal court;
- Indian tribes and Indian parents challenging procedures for temporary removal hearings;
- Federal Court held they violated ICWA and constitutional Due Process requirements

BIA Guidelines

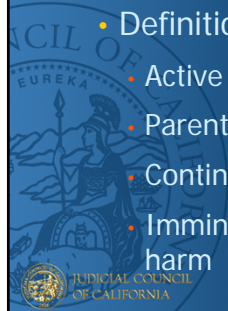
- Issued February 25, 2015
- Effective immediately
- Guidelines are persuasive authority

BIA proposed regulations

- Published March 20, 2015
- Comment period ends May 19, 2015
- Amend & supplement but do not revoke existing regulations
- Regulations when final are binding

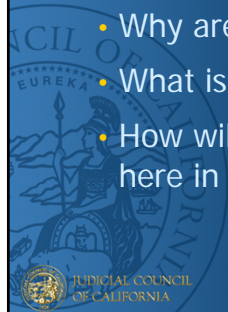
Key areas – impact in CA

- Definitions:
 - Active efforts – what's new?
 - Parent
 - Continued custody
 - Imminent physical damage or harm



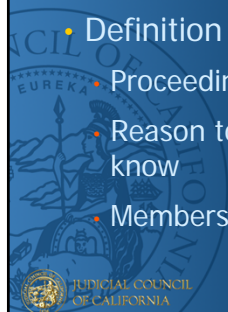
Guidelines & Regs

- Why are they necessary?
- What is their goal?
- How will they impact practice here in California



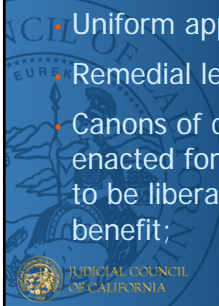
Key areas – impact in CA

- Definition – what's still not clear?
 - Proceeding? – action? Hearing?
 - Reason to believe vs. reason to know
 - Membership vs. enrollment



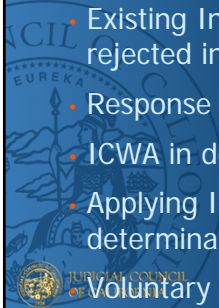
Purpose & Interpretation

- Guidelines & Regulations:
 - Uniform application in all states;
 - Remedial legislation;
 - Canons of construction – statutes enacted for the benefit of Indians are to be liberally construed to their benefit;



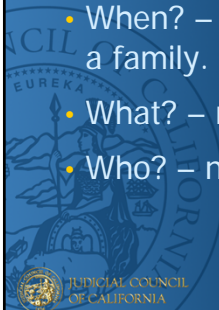
Guidelines & Regulations

- Application of ICWA
 - Existing Indian Family Exception – rejected in Guidelines & regulations
 - Response to Baby Veronica
 - ICWA in delinquency cases
 - Applying ICWA pending determination of child's status
 - Voluntary proceedings



Inquiry

- When? – as soon as contact with a family. So pre removal
- What? – not so clear what
- Who? – not so clear who



Notice

- When? –
 - “reason to believe” or “reason to know”?
 - Every hearing or each “proceeding”?
- Who – every tribe, or is that sorted out beforehand during “investigation”?
- How – registered or certified mail?

Notice

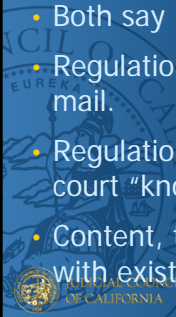
- “Reason to believe” vs. “reason to know”
 - Guideline B.2
 - Proposed Regulation 23.107

Notice – new Guidelines and regulations

- Guideline B.6 – when an agency or court knows or has reason to know
- Regulation 23.111 – when an agency or court knows or has reason to believe

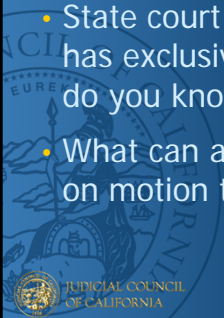
Notice – new guidelines & regulations

- Both say “registered” mail.
- Regulation 23.11 still says certified mail.
- Regulation 23.11 still says notice when court “knows or has reason to know”
- Content, timing and method consistent with existing CA law



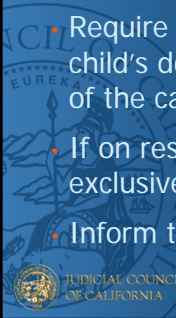
Jurisdiction & Transfer

- State court must dismiss if tribe has exclusive jurisdiction, but how do you know?
- What can and can't be considered on motion to transfer?



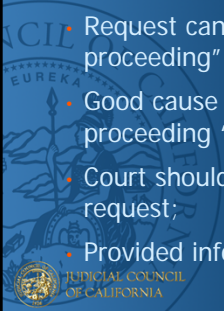
Juris – guidelines and regs

- Guideline B.5; Reg. 23.110
- Require court to make finding re. child's domicile & residence at outset of the case;
- If on reservation where tribe exercises exclusive juris. dismiss
- Inform tribal court



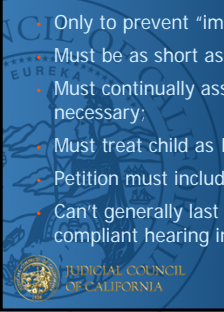
Transfer - changes

- Guideline C.1 – 4; Reg. 23.115-118
 - Request can be made at each “distinct proceeding”; at any stage
 - Good cause – no longer consider proceeding “at advanced stage”;
 - Court should notify tribal court of transfer request;
 - Provided info and records upon transfer



Emergency Removal Guidelines & Regs.

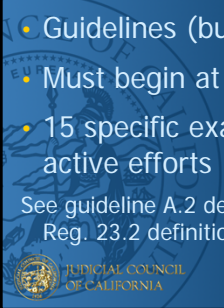
- Guideline B.8; Reg. 23.113
 - Only to prevent “imminent physical damage or harm”;
 - Must be as short as possible;
 - Must continually assess & have hearings on whether still necessary;
 - Must treat child as Indian child if “reason to believe”
 - Petition must include affidavit with detailed information
 - Can't generally last more than 30 days without ICWA compliant hearing including QEW testimony



Active Efforts – Guidelines and Regs.

- More than reasonable efforts;
- Guidelines (but not regs.) can't bypass
 - Must begin at first contact with family
 - 15 specific examples of what constitute active efforts

See guideline A.2 definition of active efforts & B.1. Reg. 23.2 definition and 23.105.

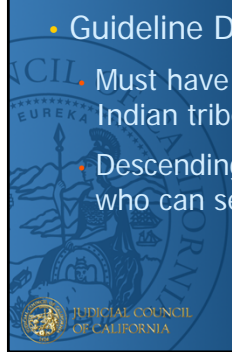


Evidence & QEW



- What's changed?
- What's required?
- Who can be qualified?

QEW – Guidelines & Regs



- Guideline D.4; Reg. 23.122
- Must have specific knowledge of the Indian tribe's culture and customs;
- Descending order of preference in who can serve.

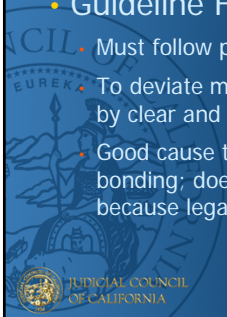
Placement preferences



- What's new?
- When do they apply?
- How often do we revisit?
- Every "proceeding"?

Placement Prefs - Guidelines & Regs.

- Guideline F.1-4; Reg 23.128-131
- Must follow placement prefs specified by tribe;
- To deviate must demonstrate diligent search by clear and convincing evidence;
- Good cause to deviate – can't consider bonding; does not include "best interest" because legal presumption re best interest



Invalidation

- Who can invalidate?
- What are grounds?
- Where do we file?

